BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of: KARINE B., Claimant, vs. FRANK D. LANTERMAN REGIONAL CENTER, Service Agency.	OAH No. 2011010137

DECISION

This matter was heard by Mark Harman, Administrative Law Judge (ALJ) of the Office of Administrative Hearings (OAH), in Los Angeles, California, on March 8, 2011.

Karine B. (Claimant), who was not present, was represented by her parents (referred to individually as Father and Mother). Julie A. Ocheltree, Attorney at Law, represented Frank D. Lanterman Regional Center (Service Agency).

SUMMARY OF PROCEDURAL HISTORY

The only issue to be decided when this fair hearing was requested was whether the Service Agency was obligated to pay for Claimant to have a functional vision assessment (FVA) conducted by Eric T. Ikeda, O.D., F.C.O.V.D., DPNAP (Dr. Ikeda), on January 17, 2011 (the 2011 FVA). An earlier FVA was conducted by a different service provider, the Center for the Partially Sighted (CPS), on November 30, 2010 (the 2010 FVA). The purpose for both of these assessments was to find out if vision therapy services would improve Claimant's visual deficits that impacted her daily living and safety skills. The Service Agency funded the 2010 FVA pursuant to a settlement agreement the parties had reached to resolve an earlier fair hearing request (OAH no. 2010011244). An unfortunate mistake occurred when the Service Agency engaged CPS to conduct the 2010 FVA, as

described in more detail in the factual findings, *post*. This occurrence led Mother to allege that the Service Agency had violated the parties' settlement agreement.

Mother further determined that the 2010 FVA was not conducted in accordance with the mutual terms and conditions of the parties' settlement agreement, and therefore, a new FVA was necessary. The evaluators for the 2010 FVA issued a report on December 2, 2010, in which they did not recommend vision therapy for Claimant; instead, they recommended that Claimant would "benefit from a screening by an orientation and mobility teacher to assess possible solutions that may help her with her mobility." (Claimant's exhibit 6 (Cl-6).)[1] Mother did not allow CPS to show its report to the Service Agency. Mother then informed the Service Agency that it would need to pay for a new FVA, and that she intended to take Claimant to Dr. Ikeda and pursue the Service Agency for reimbursement. On January 5, 2011, Mother filed a fair hearing request in the instant matter, again requesting that the Service Agency reimburse her for the cost of a new FVA. Mother paid Dr. Ikeda directly for the 2011 FVA. Dr. Ikeda's FVA report of February 24, 2011, recommended a vision therapy program for Claimant. The Service Agency, however, was not aware of the findings, conclusions, or recommendations of either CPS or Dr. Ikeda until several days before this hearing.

Dr. Ikeda's 2011 report recommended that Claimant should receive vision therapy services at a frequency of once per week for at least 48 to 52 weeks to address her ocular needs relating to her daily living and safety skills. Claimant's parents requested to add, as a second issue, whether the Service Agency was required to fund the services recommended by Dr. Ikeda. The Service Agency objected to including this new issue, since Mother's actions had by-passed the usual decision-making and dispute resolution processes under the Lanterman Developmental Disabilities Services Act[2] and had denied the Service Agency the opportunity to collaborate in the determination of goals and service needs. A fair hearing normally is not requested until the consumer or her family is dissatisfied with the Service Agency's decisions or actions; here, Claimant's family never gave the Service Agency a chance to decide what action it proposed to take, particularly with regard to the recommendations in reports that it had never seen.

After a lengthy discussion that occurred off the record, the ALJ proposed an impromptu procedure to unite the issues raised by the parties in two fair hearing procedures and to expedite a final decision that would resolve all issues concerning Service Agency funding for vision therapy services. The parties accepted the ALJ's proposal and stipulated to a process and timeline, whereby the parties each presented oral

[1] Both parties used numbers to designate their exhibits. The exhibits will be identified hereinafter with "SA" for the Service Agency's exhibits, and "Cl" for Claimant's (e.g., Cl-4; SA-23).

[2] Hereinafter, the Lanterman Act. (Welf. & Inst. Code, § 4500 et seq.) All further statutory references are to the Welfare and Institutions Code.

and documentary evidence on both issues at the hearing. The record was left open to allow Leslie Richard, M.D. (Dr. Richard), a Service Agency consultant, to review the two FVA reports, to speak with the respective evaluators, and to prepare a report with recommendations to the Service Agency. The Service Agency then prepared and submitted a written determination, which was deemed a "notice of proposed action," with respect to whether to fund vision therapy services for Claimant. Once the Service Agency submitted its notice of proposed action, the parties, if needed, could request another day of hearing be scheduled to take additional evidence.

On March 29, 2011, counsel for the Service Agency submitted her letter brief, along with Dr. Richard's written report, whereby the Service Agency denied Claimant's request for funding for vision therapy services. These documents were marked for identification as SA-30 and admitted in evidence. On April 5, 2011, the parties met for a telephonic status conference with the ALJ, at which time the parties agreed to submit their closing briefs no later than April 11, 2011. If Claimant chose to include additional evidence with her closing brief, then the Service Agency would have the opportunity for another day of hearing to present its rebuttal case.

On April 11, 2011, the parties submitted timely closing briefs, which were marked for identification as exhibits SA-31 and Cl-9. Claimant attached three science articles to her closing brief and requested the ALJ to officially notice these articles. This request is hereby denied because the articles' relevance, without expert testimony, cannot be ascertained. On April 15, 2011, the Service Agency submitted a "Notice of Errata; Frank D. Lanterman Regional Center's Amended Closing Argument," and "Notice of Request for Additional Day of Hearing; Objections to Claimant's Closing Brief," which were marked as SA-32 and SA-33. On April 20, 2011, the ALJ convened the parties for another telephonic status conference. The parties stipulated that the Service Agency could submit a reply brief no later than close of business on April 28, 2011, and that no other briefing or evidence-taking was required. On April 28, 2011, the ALJ received "Service Agency's Response to the Exhibits Attached to Claimant's Closing Brief," which was marked as SA-34. The record was closed, and the matter was deemed submitted for decision on April 28, 2011.

ISSUES

1. Should the Service Agency be required to reimburse Claimant's parents for the 2011 FVA conducted by Dr. Ikeda?

2. Should the Service Agency be required to fund vision therapy services for Claimant provided by Dr. Ikeda?

FACTUAL FINDINGS

1a. Claimant is a 16-year-old consumer of the Service Agency who is diagnosed with mental retardation and autism. She has had generalized seizures since infancy for which she takes medication. Claimant's family, doctors, therapists, and aides have helped her develop abilities and overcome many obstacles in her life. She lives with Mother, Father, and her twin brother, and attends a special day class at Glendale High School within the Glendale Unified School District (District), where she has a one-to-one aide to help her fully participate in classroom activities. Claimant is primarily nonverbal. She has an adaptive computer and adaptive chair both at school and at home. She uses multiple communication tools to express herself. According to Claimant's 2010 Individual Program Plan (IPP) document, the District provides the following services: individual physical therapy; individual occupational therapy (OT); individual and group speech therapy; adaptive physical education; socialization service; cosmetology; facilitative communication training for providers; and assistive technology. (SA-13.)

1b. Claimant does not have any functional play skills. Claimant's inappropriate behaviors interfere with her ability to function in the community. The Service Agency funds an in-home behavior intervention program using Applied Behavioral Anaylsis (ABA) at the monthly rate of 67.5 hours of direct services and 10 hours of supervision, to address Claimant's maladaptive behaviors, adaptive skills deficits, and safety issues.

1c. Claimant is ambulatory but has an unsteady gait. According to an August 2010 report of a neuropsychological evaluation conducted by Laura Seibert, Ph.D. (Dr. Seibert), a clinical neuropsychologist and Director of Neuropsychology at Casa Colina, and Ida Babakhanyan, M.A., neuropsychology extern, "[Claimant] is also at risk for falling due to balance difficulties and other gait-related problems that have been deemed as due to her scoliosis. She is reported to fall frequently." (Cl-6.) Claimant must be supervised at all times during waking hours for her safety due to the severity of her medical, cognitive, communication, and behavioral disorders, and her self-injurious behaviors. (*Id*.)

The 2010 Fair Hearing Request

2a. On December 16, 2009, Mother and Claimant's regional center service coordinator met for an annual review to discuss and update Claimant's IPP. Mother said Claimant had fallen a lot more due to Claimant's "ongoing perception issues." Mother showed the service coordinator some photographs "demonstrating multiple bruises on [Claimant's] body." (Cl-7.) She said these bruises were caused from Claimant's bumping into things and falling down due to her functional vision deficits. At this meeting, Mother requested the Service Agency to fund an FVA to be performed by Dr. Ikeda, and if needed, to fund vision therapy services for Claimant.

2b. On December 31, 2009, the Service Agency requested additional time to consider Mother's request. On January 6, 2010, Mother sent a letter to the Service Agency declining to grant additional time and, on January 11, 2010, the Service Agency issued a letter denying Mother's request and stating that the Service Agency lacked sufficient information about Claimant's medical condition or awareness of how an FVA would be utilized to meet Claimant's needs. On January 14, 2010, Mother initiated a fair hearing appealing the Service Agency's decision (OAH no. 2010011244). After a few continuances, the matter was set for hearing with ALJ Nafarette presiding.

Claimant's Earlier History of Problems with Ocular Alignment and Visual Perception

3. Ann U. Stout, M.D. (Dr. Stout), an ophthalmologist, followed Claimant as an infant for exotropia, a type of strabismus or eye misalignment, and poor visual behavior. Dr. Stout saw Claimant three times between February and April 26, 1995, and noted initially that Claimant seemed more responsive to noises than to visual stimulants. She noted Claimant appeared delayed in her motor development, "especially when compared to her twin sibling." Claimant had saccadic type pursuits and an exotropia of 45 prism-diopters with occasional upward deviation of both eyes. In later visits with Dr. Stout, Claimant was following small targets well but did not look at a face very well. Claimant's eyes appeared straighter and she was able to convert well on a near target. Her pursuit movements had smoothed out somewhat, although they were still slightly saccadic in nature. Dr. Stout felt that Claimant was improving in her visual behavior.

4. In 1998, the District began to fund OT services for Claimant provided by the Center for Developing Kids (CDK). Several years later, Claimant received vision therapy services provided by Dr. Ikeda in the CDK offices, along with her normal OT. No evaluations, notes, or reports regarding these services were offered. Dr. Ikeda in his testimony did not recall any details about the services he provided. The evidence did not establish how long these services were provided. The evidence did not establish that these services resulted in improvements in Claimant's visual function.

5a. In November 2001, Dr. Mark S. Borchert, M.D. (Dr. Borchert), a pediatric neuro-ophthalmologist, evaluated Claimant for problems with ocular alignment, global psychomotor delay, and problems with visual perception. In his note dated November 6, 2001, Dr. Borchert stated that Claimant "previously had been followed by Dr. Stout in ophthalmology for intermittent exotropia. In the past, she has worn glasses unsuccessfully. Previously, vision therapy was attempted to correct visual perceptual problems unsuccessfully." (SA-4.)

5b. Dr. Borchert further stated in his note that Claimant had equal vision in the two eyes. Her acuity could not be "quantitated" because of limited cooperation. Claimant had an intermittent exotropia which was nearly always manifest when viewing in the distance, when anxious, or when tired. Claimant also had probable manifest latent nystagmus, although qualification of the nystagmus could not be done due to limited cooperation. Visual field testing was unreliable. Dr. Borchert wrote: "My impression is

that Claimant's depth perception problems may be impacted by her easily dissociated intermittent exotropia and that she will probably benefit from strabismus surgery to correct this. In the meantime, it is reasonable to proceed with vision therapy in the school to determine if this improves her alignment and visual perceptual problems." (SA-4.)

6a. On December 3, 2002, Bill Takeshita, O.D., F.A.A.O. (Dr. Takeshita) examined Claimant for a vision therapy evaluation at the request of the District.[3] He noted that Joseph Demer, M.D., of the Jules Stein Eye Institute had not recommended surgery to correct for her strabismus since Claimant's eye muscle problem was "neurological in nature;" and that, conversely, Dr. Borchert had recommended eye muscle surgery. The purpose of Dr. Takeshita's examination was to determine whether Claimant's eye alignment problem could be treated with vision therapy. (SA-7.)

6b. Dr. Takeshita found that Claimant was classified as fully sighted and was able to use her vision to assist her to find toys to play with, to search for people, and to watch television. Her visual acuity was estimated at 20/40 or better. The degree of her farsightedness and astigmatism did not require the uses of glasses. Her peripheral vision in each eye was excellent. She could see objects positioned on the floor as she walked. "During my examination, I observed [her] to perceive objects that were in her path as she walked but she did not look with her central vision identify where and how far the object was from her. This affected her ability to navigate around obstacle." (SA-7.) Dr. Takeshita stated that, because she does not look with her central vision, she is not able to identify details that provide her with depth perception clues. Dr. Takeshita recommended the following exercises to encourage Claimant to develop her central vision:

"1. When [she] walks, place some of her favorite toys on the floor for her to pick up. . . . As she walks, she will then be forced to scan and pick up the [items].

"2. Place white or high contrast tap[e] at the edge of the riser and runner of the steps. Encourage her to step on the tape as she walks. This will force her to use her central vision.

"3. Continue to develop her balance and her ability to stand on one foot. Presently, her ability to change direction and to pivot appears to be impaired and this affects her balance and mobility.

"4. Consider using a soccer ball or other ball that she can walk up to and kick. This will force her to develop her [e]ye foot coordination. After she develops this skill, use a smaller ball.

[3] This examination occurred while Dr. Takeshita was still in private practice; whereas, now he serves as director of optometric services and coordinator for the children's program at CPS. (See factual finding number 13a, *post*.)

"5. Encourage [her] to play golf or other such games to encourage her to look at the ground." (SA-7.)

6c. Dr. Takeshita described Claimant's condition, which he called intermittent divergent strabismus, as the inability to converge both eyes together as a team. "She will alternately use her right and left eyes. Her left eye appears to be her dominate eye but she will randomly use her right eye. I believe that the manner in which she shifts from using her right and left eyes may affect her depth perception by causing a parallax shift. When she looks with her left eye, objects will appear to be directly in front of her. As she shifts and uses her right eye, those same objects will appear to have shifted by as much as two to three feet. This parallax shift affects her eye hand coordination as well as her depth perception." Dr. Takeshita concluded that: "I do not believe that her prognosis of developing straight eyes with normal eye teaming skills is good considering her neurological condition as well as her short attention. Thus, I do not recommend vision therapy. As an attempt to develop her eye teaming, eye hand coordination, and visual processing, I believe she will benefit from having frequent administration of the activities in this report." He proposed, among other things, the following activities:

"1. Encourage [Claimant] to use her central vision by asking her to identify and touch small objects with her index finger. The index finger is directly related to the central vision and allows one to identify details, and to interact with the fingers. This will encourage the development of convergence in which both eyes will work together as a team.

"2. Use small items of interest, i.e., Cheerios, marshmallows, and ask Claimant to look at the item as it gets closer to her nose. If she looks at the item with both eyes, allow her to pick it up with her fingers.

"3. Consider playing games such as inserting a pipe cleaner into a straw which is brought closer to her nose. This will develop convergence and eye hand coordination.

"4. Use Pattern Blocks or other small blocks and ask her to superimpose her blocks on top of yours. This will help her visual processing and eye hand coordination.

"5. Consider using a Crayola Stamp Marker and ask her to stamp a series of circles in left to right order.

[¶] . . . [¶]

"In summary it is my impression that [she] is fully sighted and does not require services for the blind. [She] has a large angle strabismus which affects her depth perception, eye hand coordination and visual processing skills. [Claimant] tends not to use her central vision to identify details. I have recommended activities that can be performed on a daily basis at home and at Education Spectrum. I do not recommend vision therapy to treat her strabismus due to her attention and need for repetitive

convergence activities. The activities that I provided in this report will provide [her] therapists with activities that can help her to use her vision more efficiently. Perhaps in one year, [she] will have the attention to benefit from vision therapy if she continues to have problems with her vision.

"I have informed [her] mother that we may recommend that she wear glasses with a patch on the right lens of her glasses when she performs mobility and other therapies. This will reduce the alternating of her eyes which affect her depth perception." (SA-7.)

6d. The evidence did not establish the extent to which Dr. Takeshita's recommendations were followed by Claimant's care providers.

7. Sherwin Isenberg, M.D. (Dr. Isenberg), of the Jules Stein Eye Institute of U.C.L.A., performed bilateral strabismus surgery, whereby Claimant underwent recession of her lateral rectus muscles of 6.5mm, in August 2003. Dr. Isenberg continued to follow Claimant following this surgery. After Dr. Ikeda had stopped providing vision therapy services to Claimant at the CDK, the District "wanted a written request from [Claimant's] ophthalmologist to continue services," so Mother asked Dr. Isenberg to recommend an FVA. (SA-7.) In October 2004, Dr. Isenberg wrote that Claimant "would benefit from a functional vision assessment performed at the Center for the Partially Sighted or with another comparable physician." (SA-5.) Following Dr. Isenberg's recommendation, the District funded an evaluation with Dr. John Tassanari in Pasadena, but Claimant refused to work with Dr. Tassanari and he could not conduct the evaluation. "The district then sent [Claimant] to begin service with Dr. Tong." (SA-7.)

8a. In October 2005, the District funded an evaluation by Derek T. Tong, O.D., a vision therapy services provider. Dr. Tong found that Claimant did not have external eye health problems. He stated there was a high probability that Claimant had normal visual acuity under binocular condition, as indicated by her good ability to reach for and touch small targets when using both eyes together. Her eyes appeared to be aligned when she was looking straight ahead. She had significant difficulty following moving targets and staying on track of stationary targets. Claimant's "ability to integrate her visual information with motor skills was found to be seriously deficient. [¶] . . . [¶] Evaluation of [her] visual perceptual skills using observation-based techniques showed significant delays." (Exhibit Cl-2.) Dr. Tong concluded that Claimant's visual difficulties were having "a significant impact on her school performance." Dr. Tong recommended a "play-based vision enhancement therapy program to improve her eye tracking, visual-motor, and visual-perceptual skills," consisting of one-hour office visits once per month for 10 sessions, along with visual activities to be practiced at home.

8b. After Claimant completed six monthly sessions, Dr. Tong wrote a progress note dated April 28, 2006, stating that Claimant was making progress in her visual tracking, and further, "Mother reported that [Claimant] is less accident prone and showing the ability to look down for objects in her physical therapy sessions." Dr. Tong recommended that Claimant continue her vision therapy program, for a one-hour session

once per month, for six more sessions. It was expected that Claimant would achieve the following three goals by October 2006: Claimant would be able to look steadily at a small target for 10 seconds, four out of five times; Claimant would be able to follow a target moving horizontally and then vertically, four out of five times; and Claimant would be able to change her visual focus horizontally between two targets both 16 inches away, three out of four times. Dr. Tong apparently continued providing vision therapy for Claimant through 2007, but on a date not specified, the District discontinued funding the service and her treatment program ceased. Neither the reason this occurred, nor whether Claimant had met any or all of her treatment goals, was established by the evidence.

Events Occurring After Claimant Requested a Fair Hearing in 2010

9. Dr. Isenberg re-examined Claimant on March 1, 2010. In a note to Sahag Baghdassarian, M.D., Claimant's grandfather and a neuro-ophthalmologist who has followed Claimant's ophthalmic issues since infancy, Dr. Isenberg wrote: "Mother claims that when the child is tired, she appears to have an intermittent right exotropia. However, the child is performing well with support." Dr. Isenberg found Claimant had developed manifest nystagmus, which with the intermittent exotropia, raised concerns and should be followed. He hoped that an MRI could be obtained. He wanted to see Claimant again in six months to follow up on these problems. In his note, Dr. Isenberg did not recommend vision therapy services based on this examination.

10. In July 2010, the Service Agency asked Dr. Richard to begin reviewing Claimant's medical records relating to her visual deficits and to advise the Service Agency on whether Claimant needed an FVA. In July 2010, Mother provided medical records, notes, letters, and reports by Drs. Stout, Borchert, Takeshita, Isenberg, and Tong, for Dr. Richard to review. Mother provided Dr. Richard additional information.

11a. On October 14, 2010, Dr. Borchert examined Claimant for a consultation. He noted she was able to accurately fixate and follow faces and toys, although she would not hold her gaze on most toys for very long. She had an intermittent exotropia and a "gaze-evoked, conjugate, fine horizontal nystagmus. She also had frequent saccadic intrusions with square wave jerks and questionable intermittent ocular flutter." Dr. Borchert wrote: "My impression is that [Claimant] has significant cognitive impairment, intermittent exotropia, seizures with nystagmus and superimposed saccadic intrusions, and scoliosis. I suspect that the abnormal eye movements are lifelong. However, the saccadic intrusions, particularly the significant square wave jerks, suggest a cerebellar disease and since she has not had an MRI in many years, it would be appropriate to obtain an MRI now, to look for cerebellar atrophy." (SA-11.) Dr. Borchert arranged for an MRI.[4] Dr. Borchert did not recommend vision therapy services. Dr. Richard asked to speak with Dr. Borchert, but Claimant's family refused to authorize this.

[4] A report of an MRI conducted on December 30, 2010, was admitted (Cl-6), but no expert testimony was presented to explain the significance of the report's findings.

11b. On October 26, 2010, following Mother's request, Dr. Borchert prescribed a "functional vision assessment with Center for the Partially Sighted." (SA-11.)

12a. Before the commencement of the hearing before ALJ Nafarette on October 28, 2010, the parties met to discuss settlement, and reached an interim agreement, whereby Dr. Richard would be allowed to speak with Dr. Borchert as long as it was a conference call with Claimant's parents participating. ALJ Nafarette continued the hearing, pursuant to the parties' joint request, to see if they could reach a final agreement. On October 29, 2010, Dr. Richard spoke to Dr. Borchert with Claimant's parents included in this call. Dr. Richard's notes of her conversation state as follows:

> Dr. Borchert explained that in [Claimant's] case a functional visual assessment would help to "determine what she can use her vision for." He stated that "her visual attention is limited by her poor ocular motor skill." This will help to "recognize how this affects her life and daily living." He added that "she has good vision and a FVA would help to determine ways to modify her environment to enable [Claimant] to function due to her occulomotor defensiveness." He stated that he wrote the prescription "at the request of her mom." Vision therapy was not discussed in the call.

On November 3, 2010, Dr. Richard recommended to the Service Agency that it fund the FVA at CPS, as prescribed by Dr. Borchert. The Service Agency's counsel notified Father by email on November 3, 2010, that the Service Agency agreed to fund an FVA conducted by CPS.

12b. On November 4, 2010, the Service Agency prepared an IPP amendment and a Purchase of Service Authorization (also called a "104") for CPS to conduct the FVA. The 104 was sent to CPS so that Mother could make an appointment for the FVA. The IPP amendment was sent to Mother for her signature. Both the amendment and the 104 stated that the purpose of the assessment was "to rule out vision impairment which may contribute to [Claimant's] learning." Mother refused to sign the IPP amendment because the purpose for her request for an FVA was to find out if vision therapy services would improve Claimant's visual deficits that impacted her daily living and safety skills. Mother redrafted the IPP amendment's language, and the Service Agency adopted Mother's wording. Mother signed the new IPP amendment along with a Notice of Resolution, on November 9, 2010, ostensibly resolving case no. 2010011244.

12c. Mother attended the 2010 FVA. She sensed that the CPS evaluators' questions were focused on Claimant's various school services rather than her ocular needs related to safety and daily living skills. She obtained a copy of the 104. The section of the 104 that states the rationale for the service had not been re-worded to conform to the accepted IPP amendment because it had been sent to CPS on November 4, 2010. In Mother's view, the Service Agency's 104 language demonstrated its attempt to manipulate the FVA and to label vision therapy services as educational services. M.J. Kienast, a Service Agency Assistant Director and the author of the 104, credibly

described in her testimony the circumstances of the creation of the 104 and successfully rebutted Mother's assertion of any improper motive. Further, Dr. Takeshita confirmed to Dr. Richard that CPS's FVA would be conducted the same way regardless of the notation on the 104. The CPS report of the FVA confirmed that Mother's concerns about Claimant's visual process were heard and acknowledged by the CPS evaluators.

12d. On December 3, 2010, Mother notified the Service Agency that a new FVA was necessary. On December 6, 2010, she told the Service Agency that she intended to take Claimant to Dr. Ikeda and pursue the Service Agency for reimbursement. Mother did not allow CPS to provide its report to the Service Agency. Mother declined to provide the Service Agency with contact information for Dr. Ikeda; rather, she indicated the Service Agency could reimburse her for Dr. Ikeda's FVA. Mother asked OAH to reopen case no. 2010011244, which was denied. On December 13, 2010, the Service Agency sent a notice of action letter denying Mother's request that it reimburse her $250 for an FVA by Dr. Ikeda. On January 5, 2011, Mother filed a fair hearing request in the instant matter, again requesting that the Service Agency reimburse her for the cost of a new FVA. On January 17, 2011, Claimant and he parents participated in an FVA conducted by Dr. Ikeda. On the same date, Mother directly paid Dr. Ikeda $76 for the "initial consultation" with Dr. Ikeda.

The Two FVA's

13a. The 2010 FVA report was dated December 2, 2010 and was signed by Christine Chan, O.D. (Dr. Chan), and Francisca Escobar, O.D., examining optometrists, and consulting optometrist Dr. Takeshita. During the 2010 FVA, Mother told them her concerns about Claimant's depth perception: Claimant bumped into objects on the ground; she broke her toe because she could not perceive how far a step was from her on the floor; and she tended to feel with her feet when walking. The report stated: "The purpose of today's examination was to evaluate possible causes of her difficulties with mobility to explain why she does not look toward the table or floor." The report makes no reference to the impact of Claimant's visual impairments on her learning. (Cl-6.)

13b. The report noted Claimant had not yet received mobility training. Although Dr. Isenberg prescribed glasses, Claimant does not "tolerate wearing the glasses due to her high sensitivity and her sensory disorder. [¶] Today's examination revealed that [Claimant] is partially sighted due to neurological vision impairment. This is a condition in which the visual centers of her brain do not process information normally. [Claimant] uses her vision to look at people and to watch television. However, she has difficulty with her depth perception skills and her ability to scan her environment with her eyes. [¶] [Claimant's] eyes have a moderate degree of astigmatism in both of her eyes. In addition, her left eye is also mildly hyperopic (farsighted). Her best corrected acuity measures 20/130 when tested with the Teller non-verbal Acuity Cards. Teller acuity cares tend to overestimate one's visual acuity by about three times. [Claimant's] right eye is her dominant eye and her left eye presently turns slightly outward, a condition called Exotropia. [¶] [Claimant] is extremely sensitive to having

objects touch her face. This prohibits her from wearing glasses. [She] is moderately sensitive to glare and bright light. [¶] [Claimant] has reduced depth perception. Because she is not able to coordinate her eyes together as a team, she is not able to perceive stereoscopic depth perception. This interferes with her ability to perceive where steps and curbs are located. [¶] [Claimant] also has reduced peripheral vision. She is not able to sees objects on her right side; she can only see 30 degrees to her sight side. Her ability to see objects in her lower visual field is also reduced. This deficit in her peripheral vision affects her ability to see where steps and curbs are located when she walks." (Cl-6.)

13c. "At this time, it is our impression that she is visually impaired due to her reduced acuity and reduced peripheral vision. She will benefit from a screening by an orientation and mobility teacher to assess possible solutions that may help her with her mobility." The report recommended "activities that will help her to learn to look towards the floor to scan when walking and looking at her adaptive technology. [¶] She will benefit from having her adaptive technology positioned at her central field of gaze to provide maximal use of her vision. [¶] Encourage her to look towards the ground when she walks by tossing beanbags made of high contrast fabric. Ask her to reach and pick up the bags and place them in a basket.

13d. Dr. Chan provided additional information in a telephone conversation with Dr. Richard on March 17, 2011. (SA-30.) As recorded by Dr. Richard, Dr. Chan recommended an orientation and mobility specialist and not vision therapy because such an intervention "better targets her problems." Dr. Chan said, "I don't think vision therapy would help her at all . . . because her problems center more on problems with decreased depth perception." "She has NVI (neurological visual impairment) and vision therapy has less than a [two percent] chance of helping her at all." (SA-30.)

14a. On January 17, 2011, Dr. Ikeda saw Claimant and her parents at his office. He reviewed the report from CPS, as well as reports and communications regarding Claimant's OT, physical therapy, ABA program, and Dr. Seibert's evaluation. In his report, Dr. Ikeda stated that the "entering complaint expressed was a concern of [Claimant's] visual process, particularly her depth perception and its impact on her mobility and spatial processing." Dr. Ikeda noted that Claimant had participated in OT services at the Center for Developing Kids, and that a 2008 OT progress report stated Claimant exhibited "delays in cognition and motor skills, and some tactile sensory hypersensitivity, which impacts her ability to participate in her activities of daily living." He observed that Claimant exhibited difficulty with sustained visual awareness and attention to objects and her environment, as well as divided attention, consistent with her distractibility to both visual and auditory stimuli. (Cl-6.)

> After reviewing [Claimant's] history and reports, it appears that much of her therapy addressed basic daily living skills. Understandably, the goal of [OT] is to improve participation in daily living skills; however, this does not always include improving overall visual processing skills and

> visual awareness and attention that would certainly impact safety in the home and community. Services provided for visual impairment not only impact participating in activities of daily living, which indirectly contribute to learning, but more so, it should also provide strategies, both adaptive and non-adaptive, including a integration of approaches for restitution, compensation or substitution for visual treatment strategies that contribute in a meaningful way for the patient to not only participating in daily living skills by to do so safely in the home and community. (Cl-6.)

14b. In his testimony, Dr. Ikeda stated that Claimant was constantly at work using her focal system and not using ambient/peripheral processes. She used her motor system to guide her vision to determine where she was going. He said her visual system was not in balance. He said vision therapy could be integrated with her other therapies, which could include the activities recommended by CPS. He would use two licensed occupational therapists to provide the bulk of the vision therapy. Vision therapy would attempt to integrate auditory, visual, gross motor, stimulating feedback, and making adjustments so that Claimant gained insight in how she was posturing. He said that Claimant would need cognitive insight to change. When asked how he would know if she had insight, he said by the way she responded.

14c. In a telephone conversation with Dr. Richard that took place on March 15, 2011, as recorded by Dr. Richard in her report of March 29, 2011, Dr. Ikeda stated that Claimant has ocular apraxia, which ties in to her vestibular system. She has visual processing deficits. He told Dr. Richard that vision therapy would attempt to integrate her vision with her vestibular system. He said that vision therapy was trying to get her eye movements to cooperate. Dr. Ikeda also told Dr. Richard that it would be difficult to gauge when vision therapy should end "given her cognitive deficits." (SA-30.)

Dr. Richard's Conclusions

15. On March 29, 2011, the Service Agency provided notice to Claimant's parents that it was denying Claimant's request for funding for vision therapy services and attached Dr. Richard's written report of the same date. In her report, Dr. Richard offered the following impression: "Vision therapy is not recommended because it is not an evidence based standard therapy treatment for depth perception and vestibular problems related to vision." (SA-30.) Dr. Richard went on to state: "[V]ision therapy is not an evidence based therapy that is highly regarded as a standardized treatment by many ophthalmologists (see joint statement by AAP and AAO) for visual problems such as [Claimant's] and many other problems." (SA-30.) Dr. Richard agreed with those doctors' opinions "which address the need for environmental strategies that may be used to help facilitate (Claimant's) adaptation to her home and community given her current visual deficits. As so well stated by Dr. Seibert in her report, she states that [Claimant] 'may benefit from consultation with a specialist who works with vision-impaired individuals, regarding adaptive devices that may help her be more functional.'" (SA-30.)

LEGAL CONCLUSIONS

1. The Lanterman Act codifies the state's responsibility to provide for the needs of developmentally disabled individuals and recognizes that services and supports should be established to meet the needs and choices of each person with developmental disabilities. (§ 4501.)

2. The Lanterman Act gives regional centers, such as the Service Agency, a critical role in the coordination and delivery of services and supports for persons with disabilities. (§ 4620 et seq.) The determination of which services and supports are necessary for each consumer is made through the individual program plan process. Thus, regional centers are responsible for developing and implementing individual program plans, for taking into account consumer needs and preferences, and for ensuring service cost-effectiveness. (§§ 4646, 4646.5, 4647, and 4648.)

3. The Service Agency is not required to reimburse Claimant's parents the cost for the 2011 FVA conducted by Dr. Ikeda. The FVA is a tool to determine how persons with visual deficits utilize their vision. The 2010 FVA was conducted in a routine manner. Claimant's evidence has failed to establish that the 2010 FVA is flawed due to the Service Agency having made a mistake in the wording of the 104. The CPS evaluators relied on Mother to relate Claimant's history and to express her concerns, not on the rationale for the FVA stated in the 104. The evaluators' recommendations of particular treatments followed their findings, not the other way around. The recommendations suggest strategies and activities that may facilitate Claimant's adaptation to her home and community given her current visual deficits. The report never refers to vision therapy as an effective means of improving her academic skills, which Mother suspects was a motivation underlying the 2010 FVA. Even Dr. Ikeda used the 2010 FVA report as part of his consultation and findings. A second FVA was not required, unless the purpose was to get a second opinion regarding treatment. The Service Agency generally is not obligated to fund second opinions.

4. The Service Agency is not required to fund vision therapy for Claimant. On this record, it is not possible to conclude that vision training is designed to meet Claimant's ocular needs related to her developmental disabilities. Claimant's parents seek treatment for Claimant's visual processing deficits so that, hopefully, better visual function will increase her safety when accessing her environment or when performing activities of daily living. The Service Agency's position is simply that the treatment program recommended by Dr. Ikeda is not scientifically proven to be an effective treatment for neurological vision impairments such as Claimant's.

5. The observations, findings, and recommendations expressed by Dr. Ikeda in his report, his testimony, and his statements to Dr. Richard, have not demonstrated that vision therapy services will improve Claimant's overall visual processing skills, visual awareness, or visual attention, which are the characteristics that are impacting her mobility and safety issues. Claimant's visual problems are complex. Most every

clinician has stated that Claimant's cognitive impairments are so severe that she likely will have impaired ocular motor skills her entire life. Clinicians such as Drs. Borchert and Takeshita have recommended the services of specialists in orientation and mobility solutions.

6. In Dr. Ikeda's testimony, he stated that vision therapy, to work, depends on attention and insight. Insight means an awareness of one's own mental attitudes and behavior. Based on this record, Claimant has not demonstrated cognitive abilities for insight. Therefore, it has not been established that vision therapy will work to improve her visual deficits. Under the Lanterman Act, the Service Agency is prohibited from funding vision therapy services in these circumstances.

ORDER

1. Claimant's request for reimbursement for the cost of the 2011 FVA is denied.

2. Claimant's request for funding of vision therapy services is denied.

Dated: September 7, 2011

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MARK. HARMAN
Administrative Law Judge
Office of Administrative Hearings

NOTICE

This is the final administrative decision in this matter and both parties are bound by this Decision. Either party may appeal this Decision to a court of competent jurisdiction within 90 days.